IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: March 5, 2007

Tulsi Devi Vs. State of Punjab

CORAM: Hon'ble Mr. Justice Virender Singh

Present: Ms. Deepika Verma, Advocate, for the appellant.
Mr. B.S. Sewak, DAG, Punjab.

Virender Singh, J.

Appellant Tulsi Devi widow of Kheta son of Lala, resident of village Roopra, Police Station Kotari, District Jaipur, Rajasthan (hereinafter to be referred to as "the accused") after suffering conviction under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (for short 'the Act') vide impugned judgment of learned Judge, Special Court, Bathinda dated 21.8.2000, has preferred the instant appeal. She has been sentenced to undergo R.I. for ten years and to pay a fine of Rs.1.00 lac, in default thereof to further undergo R.I. for six months.

The allegations against the appellant are that she was found in conscious possession of 1 Kg. of opium on 8.6.1999 when apprehended by S.I. Baldev Singh (PW1) who along with other police

officials including one lady constable Karamjit Kaur was present at turning of village Dikh on the road leading from Rampura to Maur. At that time, the accused was seen coming from the side of village Dikh and after seeing the police party she made an attempt to turn towards one side. She was ultimately apprehended. Jit Singh an independent witness reached there and he was also joined in the police party. As S.I. Baldev Singh had suspected some contraband being carried by her, therefore, she was apprised of her right to be searched before a Gazetted Officer for which a memo was prepared which was thumb marked by aforesaid lady constable Karamjit Kaur. Consent memo of the accused in this regard was also prepared. Thereafter DSP Sohan Singh (PW2) was called at the spot through wireless message and he after reaching there disclosed his identity of being a Gazetted Officer, upon which she gave her separate consent of being searched in his presence which was also reduced into writing and thumb marked by her and aforesaid independent witness Jeet Singh and lady constable Karamjit Kaur. Thereafter search of her person was conducted on the direction of aforesaid DSP Sohan Singh. Opium wrapped in a glazed paper tied with a string in 'Guthli' (small pack made of cloth) was found underneath the 'Ghagri' (dress worn by ladies especially from Rajasthan side). Two samples of 20 grams were extracted from it and put it into plastic containers and the remainder of the opium was found to be 960 grams which was also kept in a glazed paper and put in a separate plastic container. All the

parcels were prepared separately and sealed with the seal bearing inscription 'BS'. Specimen of the seal also was prepared separately and handed over to ASI Rajinder Singh who was already accompanying S.I. Baldev Singh. The entire case property was taken into possession vide separate recovery memo. Ruqa was sent to the Police Station on the basis of which formal FIR was recorded. Rough site plan was also prepared at the spot. After grounds of arrest were disclosed to the accused vide separate memo, she was formally arrested. Special report was sent to the superior officer which was received by Shri Hardip Singh, S.P. (D). The case property was kept in safe custody and the same was produced on the same day before the Ilaqa Magistrate along with the accused. An inventory was prepared after obtaining the orders of the Court. An application was also moved before the concerned Judge for getting the orders for depositing the case property in the Malkhana and thereafter deposited in the Malkhana. Sample was sent through Constable Mehma Singh to the office of Chemical Examiner and on receipt of the report, the accused was challaned in this case. She was charge-sheeted by the learned trial Court under Section 18 of the Act.

In order to substantiate the charge, the prosecution has examined S.I. Baldev Singh (PW1) the Investigating Officer who had reiterated the case of the prosecution. DSP Sohan Singh (PW2) had also supported the case of the prosecution being a witness to the recovery. Constable Mehma Singh (PW3) had proved his affidavit.

Report of the Chemical Examiner was also tendered into evidence.

It is worth mentioning here that lady constable Kamaljit Kaur was given up as unnecessary witness.

The stand taken by the appellant as emerges from her statement recorded under Section 313 Cr.P.C. was of false implication pleading that she was working as a labourer and was falsely implicated in this case. In defence she produced aforesaid independent witness Jit Singh as DW1 who stated that his signatures were obtained on blank papers by the police. Gita (DW2), the other witness, was the daughter of the accused who deposed that a dispute arose between her mother and a contractor for labour charges and ultimately she was got implicated in this case.

The learned trial Court after appreciating the entire evidence, convicted and sentenced the accused as indicated herein above.

I have heard Ms. Deepika Verma, Advocate, appointed by Punjab Legal Services Authority being on its panel for the appellant and Mr. B.S. Sewak, DAG, Punjab. With their respective assistance, I have gone through the entire records.

The main argument advanced by Ms. Verma is that non-examination of the lady constable in whose presence the search of the appellant was conducted is fatal to the prosecution and that flaw alone is enough to discard the case of the prosecution. Dwelling upon her arguments, Ms. Verma submits that as per Section 50 of the Act, the

search of a female is to be conducted in the presence of a female and in the present case lady constable Kamaljit Kaur was joined for that purpose and she, in fact, had conducted the search of the person of the accused as is clear from the statement of both the official witnesses. Strangely enough the said witness being the most material one has been given up as unnecessary. In the absence of the examination of the said material witness, implicit reliance on the testimony of S.I. Baldev Singh, the Investigating Officer and DSP Sohan Singh cannot be placed.

In support of her contentions, the learned counsel relies upon a judgment of this Court rendered in ***Gejo Vs. State of Punjab, 1999 (1) Recent Criminal Cases 372***.

The learned counsel then submits that despite the fact that the recovery was effected in the presence of DSP Sohan Singh and one independent witness Jit Singh who ultimately appeared in defence, the seal used for the purpose of preparing the parcels was handed over to ASI Rajender Singh by S.I. Baldev Singh who in fact was working under him only that too in the same Police Station (P.S. Balianwali). The said seal should have been given to the independent witness or even to DSP. Therefore, chances of tampering with the samples in this case cannot be ruled out. The sample was sent to the Chemical Examiner on 9.6.1999 and this shows that there was ample time with the police to tamper with the parcels. Strengthening her arguments on this aspect, the learned counsel submits that no seal of

DSP Sohan Singh was even affixed on the parcels prepared at the spot and the seal impression chit also does not bear the signatures of DSP Sohan Singh. This shows that it was not prepared at the spot.

Pointing out the aforesaid weakness, Ms. Verma states that the case of the prosecution fails with regard to link evidence also and, therefore, the prosecution case qua the accused is doubtful.

Learned counsel lastly points out certain discrepancies in the statements of the two official witnesses and states that once the prosecution case is resting upon testimony of official witnesses alone, the minor discrepancies would also assume greater importance especially when it is not corroborated by any independent source.

On the basis of the aforesaid facts Ms. Verma prays for acquittal of the appellant which is opposed by the learned State counsel on the ground that the recovery was effected in the presence of a senior police/gazetted officer (DSP) and, therefore, there is no reason to disbelieve the prosecution case. He then submits that non-examination of lady constable Kamaljit Kaur, who had conducted the search of the accused would not be fatal as the prosecution case is unfolded by the other two main witnesses to the recovery. The learned State counsel then submits that even if certain flaws have crept in with regard to handling of the case property till it reached the hands of the Chemical Examiner on 9.6.1999, the same are not of serious nature so as to dislodge the case of the prosecution in its totality as according to the report of Chemical Examiner, the seals on

the exhibits sent to him were found intact. Certain irregularities conducted by the Investigating Officer have to be ignored if the case of the prosecution is otherwise proved. On the basis of the aforesaid contentions the learned State counsel prays for confirmation of the conviction and sentence of the accused.

I do not find force in the first limb of argument advanced by Ms. Verma with regard to non-examination of lady constable Kamaljit Kaur. No doubt, the said lady constable has been given up as unnecessary, but in my view the same would not make the prosecution case weak. On facts, the case in hand is to be appreciated on two aspects; one as to whether compliance of Section 50 is there or not with regard to the offer given to the accused and secondly whether the search was effected by a female as required under Section 50 (4) of the Act. ***Gejo's case (supra)*** on which Ms. Verma has relied very heavily, in my view, is not applicable to the facts of the case. In the aforesaid case, this Court observed that there was non-compliance of Section 50 as the offer given to the accused was as to whether she wanted to be searched in the presence of the lady police, Gazetted Officer or higher officer. She was not asked as to whether she wanted to be searched in the presence of a Magistrate as required under Section 50 of the Act. Therefore, this Court while dislodging the case of the prosecution observed that if an enactment prescribes a particular mode of taking the search, it has to be taken in that very fashion and the Investigating Officer is not left with any discretion of

his own but to comply with the statute and its enactment. In the present case it cannot be said that there was no strict compliance of Section 50 of the Act. I have seen all the memos prepared at the spot especially the first one vide which SHO Baldev Singh had apprised the appellant of her right as per the enactment of Section 50 of the Act. Ms. Verma has also not been able to pin point any flaw in the offer.

In ***Gejo's case (supra)***, non-examination of the lady constable was considered to be the second defect for extending benefit of doubt towards the accused. But primarily finding a glaring procedural defect in the investigation of the case with regard to non-compliance of mandatory provisions of Section 50 of the Act in a proper manner the same was considered to be fatal to the prosecution observing the statutory offer to be a partial offer. That is not the position here in the case in hand. I have otherwise re-scanned the statement of DSP Sohan Singh who has categorically stated that after he reached the spot he apprised the appellant to be Gazetted Officer and was posted as DSP, Rampura Phul for which a separate memo was prepared and after she consented for the search in his presence, he directed lady constable Karamjit Kaur to conduct the search of the accused by taking all pre-cautions of her modesty which lead to the recovery of 'Guthli' tied around her waist with the help of string underneath the 'Ghagri' worn by her. In my view, this amounts to a complete compliance of Section 50 (4) of the Act. Therefore, on

facts, ***Gejo's case (supra)***, relied upon by Ms. Verma is distinguishable.

So far as the second attack advanced by Ms. Verma with regard to missing of link evidence is concerned, I do not find any weight in the same also and it merits rejection. In this regard, I have very minutely perused the trial court records. The accused was arrested on 8.6.1999 by S.I. Baldev Singh who was the SHO of Police Station Balianwali. No doubt, after preparing the seal parcels the seal was not handed over to independent witness Jit Singh or DSP Sohan Singh and the fact that even on the seal impression chit signatures of DSP Sohan Singh was not obtained, the same cannot be said to be a vital flaw under the circumstances of the present case for the reason that the accused was produced before the Ilaqa Magistrate on the following day along with the entire case property which included the samples. The Magistrate concerned had seen the entire case property and initialled the same. The accused was even apprised of her right that she could get another sample extracted from the main bulk but she refused to exercise her right for which her separate statement was also recorded. Thereafter the case property was returned to SHO Baldev Singh for depositing the same with the Malkhana. The order dated 9.6.1999 passed by the Magistrate is reproduced as under:-

> "Present:- APP for the State.
> Accused in custody.
> Sh.Satnam Singh Adv. Legal Aid counsel for accused.

Case property i.e. Daba Plastic sealed with seal B.S. has been produced. Two sample nip in Dibi Plastic sealed with seal B.S. produced before me and Guthali (simple bag) also produced. The same are seen and initialled. Now the case property be deposited in judicial Malkhana, Bathinda.

The accused has been told that she has right to have an other sample extracted from the Daba plastic. But she has stated that she does not intend to exercise the said right. Her separate statement to the said effect have also been recorded.

I have initialled and dated the Daba plastic as well as Dabi plastics. The Daba plastic, Dabi plastics have been returned to the worthy SHO Baldev Singh for deposit of the same with Malkhana Bathinda.

Judicial Magistrate Ist Class,
Phul/9.6.99"

The matter does not rest here. The sample was handed over to constable Mehma Singh on 9.6.1999 itself by the Investigating Officer and after getting the docket prepared, he had deposited the same with the Chemical Examiner. This fact is clear from the affidavit Ex.PO tendered by aforesaid Mehma Singh. No doubt the sample seal impression chit does not bear the signatures of DSP Sohan Singh, but the same does not make the case of the prosecution doubtful on the aspect of link evidence as the entire case property was initialled by the Magistrate on the following day of the

recovery allegedly effected and, therefore, possibly there could not be any chance of tampering with the same at any stage, including the stage of reaching the hands of the Chemical Examiner. Thus, in my considered view, the flaw pointed out by Ms. Verma in the link evidence cannot lend any advantage to her case.

The discrepancies pointed out by Ms. Verma in the statements of official witnesses are not of that serious in nature which would dislodge the case of the prosecution in its totality. Certain discrepancies are bound to occur in the statement with the lapse of time may be of an official witness or non-official witness. What is to be seen by the Court is whether the discrepancies are grave in nature, enough for the purposes of denting the case of the prosecution or not. In my view the discrepancies pointed here are not even worth considering being most insignificant and, therefore, I do not attach any importance to the same.

I have also considered the case in hand with regard to the defence set up by the accused as well and find that she cannot derive any advantage from it. She hails from Rajasthan and there could not be any reason for the SHO Baldev Singh or as a matter of fact DSP Sohan Singh of falsely implicating her in the present case. The manner in which she was concealing the contraband speaks volumes of the fact that it is a case of drug trafficking. It is not uncommon now a days that services of ladies are being availed while transporting the Narcotic drugs from one State to other State. Ratio of registration

of the cases against females is not less than the cases registered against males.

No other point has been left untouched by me.

As a sequel to the aforesaid discussion, the net result now surfaces is that the prosecution has been able to prove the charge against the accused for having in her conscious possession the contraband (1 Kg. Opium) beyond any shadow of reasonable doubt and as such the conviction and the sentence as already recorded by the learned trial Court qua her is hereby affirmed.

The instant appeal is accordingly dismissed.

The appellant is stated to be in custody since the date of her arrest and would now be serving the remaining part of her substantive sentence. The quarters concerned be informed of the pronouncement of the judgment.

(Virender Singh)
Judge

March 5, 2007
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